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IN THE
COURT OF APPEALS OF INDIANA

TODD WILLIAM EMMERT,	)	
	)	
Appellant-Co-Respondent,	)	
	)	
vs.	)	No. 11A04-0701-CV-54
	)	
ESTATE OF MAROLYN EMMERT NEES,	)	
JEFFREY EMMERT & STEVEN EMMERT,	)	
	)	
Appellees-Co-Respondents.	)	

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Robert A. Pell, Judge
Cause No. 11C01-0608-EU-49

July 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Todd Emmert appeals the trial court's construction of a will written by his mother, Maryoln Nees. We affirm.

Issue

Todd raises one issue, which we restate as whether the trial court properly construed Nees's will.

Facts

Nees had three sons, Steven Emmert, Jeffery Emmert, and Todd Emmert. On May 17, 2005, Nees executed a will. In it she provided:

> ITEM EIGHT
>
> I devise the 90 acre tract of farmground, which I own in my own name, located in the Northeast Quarter of Section 16, Township 12 North, Range 6 West to my son Todd William Emmert. Todd understands and agrees that he is never to sell or rent said farmground to his father, Ross William Emmert, or his designees.
>
> To compensate my sons Steven Ross Emmert and Jeffery Robert Emmert for the gift of the 90 acres to Todd William Emmert, I devise Steven Ross Emmert and Jeffery Robert Emmert each a sum of money equal to one-third the value of the 90 acres as appraised at the fair market value on the date of my death. . . .

App. p. 16. Other than the devise of two guns to Todd, the three sons were to receive equal shares of the remainder of Nees's estate. See App. pp. 15, 17.

Nees died, and on August 31, 2006, the executor of her estate filed a petition for construction of the will. After a hearing on the matter, the trial court ordered in part:

> the bequest to Steven Ross Emmert and Jeffery Robert Emmert of a sum of money equal to one third of the value of the ninety acres devised to Todd William Emmert is a demonstrative legacy payable out of the ninety acres. Court has examined the Will and finds that this will give effect to the testator's general intention of treating all three brothers equally. In other words, the source of the funds to compensate Steven Ross Emmert and Jeffrey Robert Emmert is not the residuary of the estate, but from the ninety acres themselves. Court rules that the ninety acre tract of farm ground is devised to Todd William Emmert subject to a lien in favor of Steven Ross Emmert in the amount of one-third of the value of the ninety acres and a lien in favor of Jeffery Robert Emmert in the amount of one-third of the value of the ninety acres.

Id. at 5. Todd filed a motion to correct error, which was denied. He now appeals.

Analysis

Todd argues that the trial court improperly concluded that Steven and Jeffery should receive their one-third of the value of the ninety acres from a lien on the property. Because the facts are not in dispute, the only issue is whether the trial court correctly construed Nees's will. See In re Estate of Owen, 855 N.E.2d 603, 608 (Ind. Ct. App. 2006). The interpretation, construction, or legal effect of a will is a question of law to be determined by the court. Id. Our review is de novo, and we owe no deference to the trial court's legal conclusions. Id.

In construing a will, we determine and give effect to the testator's intent as expressed in the will. Id. We must consider and give effect to every provision, clause, term and word of the will, if possible, to determine that intent. Id. "We look to the 'four corners' of the will and the language used in the will to determine the testator's intent." Id. at 608-09. We assume the testator used the words in the will in their common and ordinary sense and meaning. Id. at 609.

If there is an ambiguity in the will, we must determine whether other provisions of the will make clear the testator's intent. Id. "Once the testator's intent has been determined, it is controlling and must be given effect so long as it is not contrary to law." Id. A testator may devise property with attached terms or subject to conditions, regardless of how capricious or unreasonable the terms or conditions may seem, unless they violate some statute or established principle of law. Id.

At issue here are the first two paragraphs of ITEM EIGHT in Nees's will:

> I devise the 90 acre tract of farmground, which I own in my own name, located in the Northeast Quarter of Section 16, Township 12 North, Range 6 West to my son Todd William Emmert. Todd understands and agrees that he is never to sell or rent said farmground to his father, Ross William Emmert, or his designees.
>
> To compensate my sons Steven Ross Emmert and Jeffery Robert Emmert for the gift of the 90 acres to Todd William Emmert, I devise Steven Ross Emmert and Jeffery Robert Emmert each a sum of money equal to one-third the value of the 90 acres as appraised at the fair market value on the date of my death.

App. p. 16.

Todd argues that the first paragraph and second paragraph are separate bequests and that the property he received should not be encumbered by a lien on the property, but that his brothers should receive their one-third value from the "general estate." Appellant's Br. p. 7. He suggests that the first paragraph is a specific legacy[1] and that the second paragraph is a general legacy.[2] He also refers to the doctrine of "ademption by extinction," which is "defined as an act which causes a legacy to become inoperative because the subject matter of the legacy has been withdrawn or disappeared during the testator's lifetime." In re Estate of Warman, 682 N.E.2d 557, 560 (Ind. Ct. App. 1997), trans. denied. "Ademption applies only to specific legacies and occurs only when the subject matter of the legacy is so altered or extinguished that the legacy is completely voided. The legatee is not entitled to look to the general assets of the estate for satisfaction in lieu of the specific bequest." Id. (citation omitted).

Here, however, we do not find this distinction relevant, as there is no indication that the property, the subject matter of the legacy, was disposed of during Nees's lifetime. The issue is not whether there are sufficient funds in the remainder of Nees's estate from which the brothers' one-third value could be paid. Instead, the issue is whether Nees intended to give Todd 100% of the value of the property by giving him title to it outright

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[1] "A legacy is specific when it can be determined only by delivery of some particular portion of, or article belonging to, the estate which the testator intended should be transferred to the legatee in specie." Key v. Sneed, 408 N.E.2d 1305, 1307 (Ind. App. Ct. 1980).

[2] "A general legacy is defined as a bequest out of the general assets of the testator's estate, such as a gift of money or other things in quantity not in any way separated or distinguished from other things of the same kind." Id.

while giving Steven and Jeffery only one-third of the value of the property or whether she intended for them each to receive one-third of the value of the property.

We believe, based on the entirely of the will, that Nees intended for Todd, Steven and Jeffery to take equally under her will. This is indicated in part by ITEM SEVEN, which provides that under certain circumstances her three sons shall "share and share alike" her personal property. App. p. 16. She wanted any disputes resolved "in an equitable manner." Id. In the remainder of ITEM EIGHT, regarding certain farmland sold on contract, Nees divided the proceeds in equal shares to her three sons. Finally, ITEM TEN, which provides that her sons should each receive a one-sixth share in the remainder of her estate, shows Nees's intent to treat her sons equally. Further lending support to this interpretation is the language in ITEM EIGHT that provides, "To compensate my sons Steven Ross Emmert and Jeffery Robert Emmert . . . ." Id. This is indicative of Nees's intent to treat her three sons equally.

We are unpersuaded by Todd's argument that Nees had a special agreement with Todd based on the language that he never sell or rent the property to his father, Nees's ex-husband. This condition does not indicate an intent that Todd receive an increased gift; it simply shows that Nees did not want her ex-husband to benefit from her property.

Finally, Todd argues the gift to his brothers does "not demonstrate a contrary intent on the part of the testator to leave [him] any less than a fee simple title in such real estate." Appellant's Br. p. 6. Assuming, as Todd asserts, that unless the will says otherwise the devisee shall take fee simple title in land, Nees placed conditions on Todd's ownership of the land in that he may not ever sell or rent it to his father. Moreover, the

trial court's order subjecting the property to a lien does not in and of itself give Todd less than fee simple title to the property. The lien at issue here is simply security for a debt; it does not give Steven and Jeffery any incidents of ownership. See Oldham v. Noble, 117 Ind. App. 68, 75, 66 N.E.2d 614, 617 (1946) ("Indiana is unequivocally committed to the lien theory and the mortgagee has no title to the land mortgaged. The right to possession, use and enjoyment of the mortgaged property, as well as title, remains in the mortgagor, unless otherwise specifically provided, and the mortgage is a mere security for the debt.").

We therefore conclude that with the exception of the two guns, Nees intended to treat he three sons equally under her will. Because "in a will, the intention governs the words[,]" the trial court properly ordered that the property was subject to a lien in favor of Steven and Jeffery. Billings v. Deputy, 85 Ind. App. 248, 253, 146 N.E. 219, 221 (1925).

Conclusion

The trial court properly interpreted Nees's will to include a lien on the property in favor of Steven and Jeffery. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.